

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 24, 2006

STATE OF TENNESSEE v. JAMES SHANNON DIGBY

Appeal from the Circuit Court for Blount County
No. C-15280 D. Kelly Thomas, Jr., Judge

No. E2006-00278-CCA-R3-CD - Filed November 14, 2006

The defendant, James Shannon Digby, appeals from the Blount County Circuit Court's order revoking his probation for failure to pay court costs and supervision fees for a misdemeanor worthless check conviction. The trial court ordered the defendant to serve his sentence of eleven months and twenty-nine days in jail, less credit for time served. The defendant claims that the trial court failed to find that his failure to pay was willful. We hold that the trial court made the appropriate findings and affirm its judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal), and Raymond Mack Garner, District Public Defender (at trial), for the appellant, James Shannon Digby.

Michael E. Moore, Acting Attorney General; Sophia S. Lee, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Nichole D. Bass, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

According to the record, the defendant wrote a worthless check on March 26, 2001. He apparently wrote other worthless checks, but the charges and judgments for the convictions relative to those offenses are not contained in the record. The general sessions court granted the defendant an order of abeyance, but it revoked the abeyance when the defendant failed to make the required payments and entered a judgment on April 23, 2004. The general sessions court revoked the defendant's probation on November 19, 2004, when he failed to make payments. The defendant appealed the matter to the trial court, at which point the parties entered into an agreement that the defendant would receive a sentence of thirty-one days in jail with credit for time served and would

return to probation. The violation warrant that precipitated the present matter issued on November 21, 2005, alleging that the defendant owed court costs that would not be paid in full by the discharge date of December 19, 2005, and that the defendant had not paid supervision fees for July through November 2005.

At the revocation hearing, Terry Fowlkes, the defendant's probation officer, testified that the defendant had reported regularly, although he had failed to make the required payments. Fowlkes said that the defendant had worked sporadically. He said the defendant relied on his father for transportation. He said the defendant made seven to eight dollars an hour when he was employed. Fowlkes testified that the defendant said each month that he would pay but that he never made the payments. Fowlkes said that he did not think the defendant was serious about probation. He said that the defendant knew he had payments to make and that he was required to have a full-time job, but he did not do those things.

The defendant testified that he was married with four children and one stepchild. He said he paid child support, which was garnished from his wages. He said he did not make the required payments because he never had the money. He said that he had a temporary job that was supposed to become permanent but that he was arrested for driving on a revoked license and lost that job. He said his area of experience was working outdoors, but he had experienced difficulty finding that type of work. He said he wanted to get a manufacturing job where he could make eight to ten dollars an hour so that he could make the payments. He proposed that he could pay \$150 to \$200 a month if he were able to obtain a manufacturing job. He said that he had a car but that he did not drive because he could not afford the \$300 necessary to have his license reinstated after an earlier DUI conviction. He said that his wife and his father provided his transportation. He said that his income was about \$10,000 to \$15,000 a year, that he received food stamps, and that his wife did not work. The defendant admitted, "I probably could have tried harder. I mean, as far as going to get a manufacturing job. But I was trying to stay in the line of work that I knew I could do."

The trial court took notice of the court's records. Those records have not been provided in the record on appeal, but the court noted on the record at the hearing that the defendant had paid \$100 for costs and restitution¹ since entering into an agreement over a year before the revocation hearing.

Upon receiving the evidence, the trial court found:

Mr. Digby has violated his probation. He didn't appear in court when he was supposed to. He entered into an agreement to pay the restitution and that was over a year ago and he's only paid \$100 on the cost[s] and restitution since then. He says he can get out and do a couple of things and pay \$150 a month, which proves to me that he

¹The revocation warrant does not state as a basis for revocation that the defendant failed to pay restitution. It was apparent from the evidence, however, that the defendant had not paid costs, supervision fees, and restitution.

could have been doing that for the whole last year, if that's what he had wanted to do. And he's worked off and on and just hasn't paid. And this is the second time that all this has happened. As General Bass said, there are Orders in the Sessions Court ordering him to pay so much a month. He has a job making good money, drives on revoked, loses it. You know, it's just a bad case of the "can't help its."

The court ordered the defendant to serve his sentence in jail.

The defendant claims on appeal that the trial court erred in revoking his probation because his failure to pay was not willful. Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, our supreme court has stated:

We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. State v. Williamson, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. State v. Milton, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). If the allegation is that the defendant has failed to make payments required as a condition of probation, the trial judge must find that his refusal to pay was willful or that he failed to make sufficient bona fide efforts to acquire the resources to pay. State v. Dye, 715 S.W.2d 36 (Tenn. 1986); see Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064 (1983).

In the present case, the undisputed evidence is that the defendant had a difficult financial situation. The trial court found, however, that the defendant had been given a prior opportunity to satisfy his financial obligations but that he had not made sufficient bona fide efforts to do so. The defendant himself testified that he could have done more than he had to obtain a well-paying job.

The court found that the defendant had “worked off and on and just ha[d]n’t paid” even though he had been ordered to make specified monthly payments.

There is substantial evidence in the record to support the trial court’s order revoking the defendant’s probation. The trial court did not abuse its discretion. In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE